



February 26, 2001

Ms. Leah Simon Clark
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2001-0697

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144410.

The City of Waco (the "city") received a request for any records held by Victim Services pertaining to a disturbance at a specified address. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the information at issue.¹

We begin with your argument that portions of the submitted information are excepted under section 552.101 in conjunction with chapter 611 of the Health and Safety Code. Section 552.101 excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 encompasses confidentiality provisions such as section 611.002 of the Health and Safety Code. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

¹We assume that the "representative sample" of records submitted to this office is truly representative of all of the information at issue. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

Health and Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990).*

You explain that the submitted information

was obtained and maintained by the Victim Services Program of the City of Waco’s Police Department. The Victim Services Program is directed by a Licensed Professional Counselor Intern. The program was implemented to assist victims of crime and their families during times of crisis by providing counseling and associated services through direct contact and/or referral.

Although you state that the director of the Victim Services Program is a licensed professional counselor intern, you do not explain whether the director meets the definition of “professional” under section 611.001. Moreover, the submitted information includes documentation of communications between clients of the program and program staff. You do not explain whether these staff members meet the definition of “professional” under section 611.001. The documents themselves contain no indication that they were created or are maintained by a “professional” as that term is defined in section 611.001. Consequently, we cannot find that any of the submitted information is confidential under section 611.002 as encompassed by section 552.101.

We turn to your argument that portions of the submitted information are confidential under section 552.101 in conjunction with common law privacy. Section 552.101 of the Government Code also protects information coming within the common law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. We believe that most of the submitted information constitutes intimate information in which there is no legitimate public interest. Therefore, we find that the city must withhold most of the submitted information under common law privacy as encompassed by section 552.101. We have marked the information to be withheld under section 552.101 in conjunction with common law privacy.

We note, however, that the requestor in this case is entitled to some of this confidential information under section 552.023 of the Government Code. Under section 552.023,

[a] person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.

Gov't Code § 552.023. Due to this special right of access, the city must release the portions of the submitted information that pertain exclusively to the requestor if it has not already done so. We have marked the information that the city must release to this requestor under section 552.023.

Finally, there are portions of the submitted information that are not confidential under common law privacy but that may be withheld from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. Open Records Decision No. 574 at 3 (1990). In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We agree that the information you have marked as falling within the attorney-client privilege is excepted under section 552.107(1). Therefore, the city may withhold these pieces of information, which we have marked.

In conclusion, the city must withhold most of the submitted information under section 552.101 in conjunction with common law privacy. However, the city must release information pertaining exclusively to the requestor under section 552.023. The city may withhold information revealing its attorneys' legal advice from its attorneys under section 552.107(1). We have marked the non-redacted set of submitted information in accordance with this ruling.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

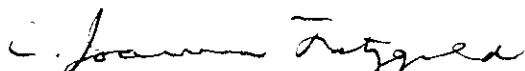
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF/er

Ref: ID# 144410

Encl: Submitted documents

cc: Mr. Bruce Mercer
3900 Charlton Ave.
Waco, Texas 76711
(w/o enclosures)